CASE NOS. 18-1017 & 18-1049

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Agency Decision in 08–CA–038092, 08–CA–038581, 08–CA–038627, 08–CA–063901, 08–CA–073735, 08–CA–092476, 08–CA–097760 and 08–CA–098016 Reported at 362 NLRB No. 57 and 365 No. 157)

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.
Petitioner/Cross Respondent

vs.

THE NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

ORAL ARGUMENT REQUESTED/ NOT YET SCHEDULED

Ronald L. Mason (54642)
Aaron T. Tulencik (54649)
Mason Law Firm Co., L.P.A.
P.O. Box 398
Dublin, Ohio 43017
t: 614.734.9450
f: 614.734.9451
rmason@maslawfirm.com
atulencik@maslawfirm.com

Counsel for Petitioner, Midwest Terminals of Toledo International, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SUMMARY OF ARGUMENT

Nothing in Respondent, the National Labor Relations Board's (the "Board") Brief sufficiently rebuts the showing by Petitioner, Midwest Terminals of Toledo International, Inc. ("Midwest" or Company") that the totality of the record evidence establishes that the Board's rulings, findings and conclusions are irrational, arbitrary, and not supported by the record evidence and, in the instance of the cessations of dues checkoff, violated Midwest's due process rights.

1. § 8(a)(1) and (3) violations related to Otis Brown (8-CA-38092)

The Board did not even attempt to address the gate logs and charged hour time sheets illustrating that Midwest either hired Brown during the time period in question or had legitimate, non-discriminatory reasons on the days when Brown was not hired. Instead, the Board argued that employee testimony contradicted the gate logs and charged hour sheets.

2. § 8(a)(1) and (5)§ related to cessation of dues checkoff (8-CA-97760)

Midwest put forth substantial record evidence which provided clear and convincing evidence establishing that the Board's post hoc midterm modification theory was manufactured long after briefing had concluded, was not the General Counsel's theory of the case, nor was it fully and fairly litigated during the hearing. Accordingly, the Board violated Midwest's constitutional due process rights. The Board's argument that the midterm modification issue was fully and fairly litigated

because of the single phrase uttered by the General Counsel in her opening statement, because the May 2012 Memorandum of Understanding ("MOU") speaks for itself and because the ALJ mentioned the MOU in his decision while discussing Midwest's affirmative defense is baseless. The overwhelming record evidence and case law cited by Midwest (the Region's request for information, the Regions Complaint allegations, the record evidence submitted at trial with respect to this issue and the ALJ's decision) unquestionably establishes that the Board's midterm modification theory was not fully and fairly litigated and, thus, violated Midwest's Due Process Rights.

3. Laches

The ALJ determined that Midwest did suffer prejudice due to General Counsel's extensive delays and that the General Counsel offered no evidence explaining the substantial delay. Further, while Board precedent states that defense of laches is generally inapplicable, there not an absolute bar. Given the unique circumstances in this case, the doctrine of laches should have been implemented.

Alternatively, the Board should have at least adopted Member Johnson's view with respect to the doctrine of laches and the Board, in its brief, failed to address why this Court should not do so.

4. Ratification

Midwest asserts that the act of ratifying the Complaints (and thereby the entire administrative proceeding) approximately two and one half (2 ½) years after the Board's original Decision and Order and nearly four and one half (4 ½) years after the Complaints issued does not remedy the original unauthorized complaints. Further, the Board failed address why the facts of this case, which are identical those in *S.W. General* should preclude dismissal of this Complaint, just as this Court ruled in *S.W. General*.

5. § 8(a)(1) Violations (8-CA- 38581, 63901, 92476 and 98016)

Midwest did not waive its challenges to the § 8(a)(1) violations. Midwest filed a motion with this Court seeking permission to exceed the 13,000 word limit informing the Court that the limit was not reasonable given the circumstances of this case. The Court and the Board disagreed. Accordingly, Midwest had no plausible choice but to refer the Court to its Exceptions and Brief in Support it filed before the Board.

ARGUMENT

I. MIDWEST'S PETITION FOR REVIEW SHOULD BE GRANTED AND THE BOARD'S CROSS APPLICATION FOR ENFORCEMENT SHOULD BE DENIED BECAUSE THE BOARD'S ORDER IS IRRATIONAL, ARBITRARY, NOT SUBSTANTIALLY SUPPORTED BY THE RECORD EVIDENCE AND VIOLATED MIDWEST'S DUE PROCESS RIGHTS

A. Purported §§ 8(a)(3) and (1) Violations

1. The Board's Brief disregards the tangible record evidence and instead relies on witness testimony. (8-CA-38092)

Nothing in the Board's Brief refutes that the Board's findings are not substantially supported by the record evidence. The Board's finding is irrational, arbitrary and in direct conflict with the Board's finding that the timing in the reduction of hours supports an inference of animus.

The ALJ relies upon 4 instances of protected activity to establish that Midwest refused to hire Brown in June, July and August 2008: (1) Midwest's knowledge of Brown's purported "intent" to file a grievance on May 9; (2) Brown's July 22, 2008 grievance; (3) Brown's August 1, 2008 grievance; and (4) Brown's August 7, 2008 grievance.

With respect to the allegation that Midwest refused to hire Brown's in June hours, the ALJ could only rely upon Brown's stated intent to file a grievance on May 9. However, the May time records indicate that Brown worked 117.25 hours, his third highest monthly total for the year. Thus, the Board found that Midwest

refused to hire Brown in June based upon his stated intent to engage in protected activity on May 9. However, per the Board's theory, Midwest decided it would wait till June to discriminate against Brown. Further, per the Board's theory, Midwest decided it would no longer discriminate against Brown in September, even though Brown filed another grievance on September 19, 2008. (JA 97) Such a theory defies comprehension.

In its brief, the Board maintains the tangible evidence set forth in the gate logs and charged hour sheets which establish that Midwest was *not* refusing to hire Brown for discriminatory reasons, but rather because he was not needed, was not qualified or did not show-up are simply hypothetical explanations cobbled together from parsing through record evidence. Brief, p. 28. Rather than addressing this evidence, which the General Counsel itself introduced into the record, the Board, like the ALJ relies upon Brown's "credited" testimony that he regularly presented himself for hire between June and August. (JA 96)

The ALJ contradicted himself when he credited Brown's testimony because he simultaneously acknowledged that Brown, due to "personal issues," did not want to go on the skilled list during this time period because he would then be obligated to make himself available for work every day. (JA 95, FN8).

The record evidence establishes that Brown failed to present himself for hire at least seven (7) days during this time period (JA 350-356, 359, 367, 372 & 377-

379) and there are no gate log records for eleven (11) other days (June 7, 8, 9, 15, 30, July 19, 20, August 9, 13, 23 and 27) to verify whether Brown presented himself for hire. The charged hour sheets further establish that of the 91 days in June, July and August 2008, Brown was either hired, or, Midwest only hired persons from the skilled list (of which Brown was not a member), only hired persons from the skilled list and the first person on the regular list (Brown was number 2) or Brown did not possess the requisite qualifications to perform the available work, i.e. an end loader on 77 of those days. These are not hypotheticals or partial explanations. Rather, the charged hour sheets and the gate log records are tangible record evidence which establish the justification for Brown's reduction in hours while simultaneously discrediting Brown's testimony and substantially detracting from the weight of the evidence the Board used to support its finding that Midwest unlawfully refused to hire Brown.

Remarkably, the Board argues that the charged hour sheets are not accurate and/or cannot be relied upon. The Board states as follows:

> Midwest's assertion that it often fulfilled its staffing needs by mechanically following the contractual order-of call-procedure, and relying exclusively on just over a dozen employees who had priority over Brown in either seniority or qualifications, is in tension with the credited testimony of employee Rizo, Jr. His testimony, which was corroborated by several other employee witnesses, shows that during the time period in question Midwest did not mechanically dole out assignments in accordance with the contractual order-of-call, but exploited opportunities to hire employees lower in seniority than Brown, outside the contractually mandated shape-up.

Brief, pp. 29-30. Rather than address the gate logs and charged hour sheets and the undisputed info provided therein, the Board simply dismisses them because they are at odds with employee testimony. Importantly, the ALJ dismissed the General Counsel's allegation that Midwest, on or about June 2008, ceased applying seniority principles in assigning work to employees in violation of § 8 (a)(5) and (1) of the Act. (JA 98-100.)

The record evidence does not support the Board's decision that Midwest refused to hire Brown in June, July and August 2008 based upon protected activity in May, July, August and September. This Court will set aside the Board's decision in its entirety where "it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view.*" See, *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 719 (D.C. Cir. 1981) (Emphasis added.) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). When reviewing the record for substantial evidence, this Court must "take account of anything in the record that '*fairly detracts*' *from the weight of the evidence supporting the Board's conclusion.*" See, *General Electric Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997) (Emphasis added.) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

2. Midwest did not refuse to assign Brown light duty work on November 27, 2008 and several days thereafter. (8-CA-38092)

The Board's findings and conclusions are irrational, arbitrary and not substantially supported by the record evidence. Leach testified that the only job Brown could perform with limited neck movement and no driving (Brown's work restrictions) was the hopper. That is the job Brown performed the previous day, but the job went to a person on the skilled list on the day in question. The ALJ found such action was "consistent with the contract and past practice." (JA 103) Remarkably, the ALJ determined that although Leach's testimony was consistent the contract and past practice, Leach's real reason for not hiring Brown was pretext – Leach purportedly spoke to Brown's doctor who informed Leach that Brown's injury was far more severe than what was stated on his work restrictions. (JA 103). Accordingly, the ALJ determined as follows:

> With respect to cases in which an employer's asserted reasons for its alleged discriminatory conduct are found to be pretextual, the Board does not apply the second part of the *Wright Line* analysis. In this connection, in *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), the Board indicated:
>
> > However, if the evidence establishes that the reasons given for the Respondent's actions are pretextual-that is, either false or not in fact relied upon the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*. 255

> NLRB 722 (1981). [Accord: *Austal USA, LLC*, 356 NLRB No. 65 (2010).]

Thus, on its face, the ALJ's decisionis at odds with this Court's findings in *Ozburn-Hessey Logstics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016). In *Ozburn-Hessey*, this Court determined if the "Board concludes, as it did here, that the employer's purported justifications for adverse action against an employee are pretextual, then the employer fails as a matter of law to carry its burden at the second prong of *Wright Line.*" Here, the ALJ expressly stated he need not apply the second prong.

The ALJ determined that the real reason Brown was not assigned light duty work was because of the May 2008 grievance Brown threatened to file and the June, July, August and September grievances he did file. Again, this argument is irrational and arbitrary. The ALJ previously determined that Midwest refused to hire Brown only during the months of June July and August, but not September, October, November and December. So, in one instance the ALJ determined that Midwest did not retaliate against Brown during the months of November and December because he had previously filed grievances. Conversely, in this instance, the ALJ found that Midwest did retaliate against Brown during the months November and December. These contradictory rulings demonstrate decisions based upon personal whim rather than objective criteria.

The totality of record evidence illustrates that Midwest did not treat Brown disparately in comparison to another employee on light duty, or alter its light duty policy in any way. In an effort to show disparate treatment the General Counsel argued Brown had injured his arm once before and Leach put him on light duty. However, on cross-examination, Brown acknowledged that he was able to perform the job he was assigned (a checker) and the Company did not have to accommodate him in any way. (JA 260-261) Second, General Counsel introduced evidence that Newcomer was injured in November 2008 in or around the same time as Brown's injury and that Newcomer was offered light duty. (JA 886-887) However, Newcomer's restrictions were not as limiting as Brown's. Unlike Brown, Newcomer was (1) allowed to drive and operate heavy equipment; (2) was not placed on any medications, (3) was on the skilled list. (JA 480) As soon as Brown was able to work without restrictions he was hired as is indicated by his twelve (12) hour shifts on December 3 and 4, 2008. (JA 408, 411)

An objective analysis dictates that if Midwest was engaged in a concerted effort to retaliate against Brown for earlier protected activity, Midwest would not have hired Brown the previous day (Nov. 26) to operate the only machine he could safely operate given his work restrictions, nor would it have hired Brown once his work restrictions were lifted.

a. Midwest properly excepted to the ALJ's finding that Midwest's action was motivated by animus.

The Board cannot credibly argue that Midwest failed to sufficiently except to the ALJ's finding that the General Counsel demonstrated Midwest's action was motivated by antiunion animus. Specifically, Midwest proffered the real reason why Brown was not hired (no work available which matched his work restrictions) and then Midwest put forth evidence that its actions towards Brown were not discriminatory, but rather, consistent with past practice. Past practice evidence is relevant to the first *Wright Line* inquiry into anti-union animus. See, *Meco Corp. v. NLRB*, 986 F.2d 1434, 1438 (D.C. Cir. 1993). The lack of disparate treatment is a factor to be weighed against the General Counsel's record evidence. Ibid. Accordingly, Midwest's Exception provided adequate notice to the Board that it excepted to the ALJ's finding of animus. See, *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (Company's objections were "no paragon of precision and detail' but the specific exception to the finding and the arguments that the findings were not supported by evidence provided the Board adequate notice to the Board).

B. Purported § 8(a)(5) and (1) Violations

1. Midwest overwhelmingly established that the Board violated its due process rights when it created its post hoc midterm modification violation theory.

In *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 228 (D.C. Cir. 1980), this court stated: "Although the General Counsel is entitled to rely upon alternative theories, Respondents must have proper notice that this is being done. Fair play demands nothing less." Due process requires that the "charged party is given adequate notice of all the alleged violations of the Act and that these violations are litigated before sanctions are imposed." See, *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 283 (D.C. Cir. 1981).

The misguided arguments set forth in the Board's brief (pp. 44-47) do not change the fact that the Board's midterm modification theory was: (1) not clearly presented at the hearing; (2) not a theory of the General Counsel's case; (3) not fully and fairly litigated; and (4) not squarely before the Board. Additionally, the Board failed to address most, if not all of the substantial facts in this case which establish that the Board's theory was not fully and fairly litigated.

A determination as to whether a certain issue has been fully and fairly "is so peculiarly fact-bound as to make every case unique; a determination of whether there has been full and fair litigation must therefore be made on the record in each case." See, *Pergament United Sales, Inc. v. NLRB*, 920 F2d 130, 136 (7th Cir.

1990). Midwest did not have proper notice that the General Counsel was seeking a violation of the Act wherein the cessation of dues checkoff constituted an unlawful contract modification within the meaning of § 8(d) of the Act, 29 U.S.C. § 158(d).

The facts set forth below illustrate that the General Counsel was only relying on Board's then recent decision in *WKYC-TV*, 2012 NLRB LEXIS 851, *37 (2012) wherein the Board stated that "an employer, following contract expiration must continue to honor a dues checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer."

(1) When investigating this charge the Region issued the following request for information:

> The Union alleges that since on or about January 18, 2013, the Employer has ceased deducting dues from employees' paychecks despite having valid authorizations from employees to do so. The Union alleges that the Employer has cited the lack of a collective bargaining agreement as its justification for doing so. Please confirm whether or not the Employer has ceased deducting dues from employees' paychecks and, if the Employer has done so, please provide the Employer's basis for the action given the Board's recent decision in *WKYC-TV, Inc.*, 359 NLRB No. 30 (Dec. 12. 2012);
>
> (JA 309)

(2) The Region's Complaint against Midwest states in relevant part:

> 8. (A) On or about January 1, 2013, Respondent ceased dues checkoff for employees in the Unit.

> (B) The subject set forth above in paragraph 8(A) relates to wages, hours and working conditions of employment in the Unit and is a mandatory subject for the purposes of collective bargaining.
>
> (C) Respondent engaged in the conduct described above in paragraph 8(A) without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.
>
> 9. By the conduct described above in paragraph [ ] 8 Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(l) of the Act.
>
> 10. By the conduct described above in paragraph 8, Respondent has refused to bargain collectively with representatives of its employees in violation of Section 8(a)(5) of the Act;

(JA 48-49)

(3) The General Counsel amended the Complaint during the Hearing but the amendments had nothing to with the cessation of dues checkoff; (JA 246-248)

(4) The scant testimony elicited by the General Counsel regarding MOU (JA 890) was offered in support of General Counsel's claim that Midwest violated §8(a)(5) and (1) of the Act by failing to implement or execute a successor contract, not the cessation of dues checkoff; (JA 262-263)

(4) The General Counsel moved to re-open the record for further proceedings regarding the cessation of dues checkoff but still failed to elicit any testimony relative to the May 22, 2012 Memorandum of Understanding.

(5) The ALJ unmistakably notes that General Counsel's theory of the case was limited to a violation of the Act based upon the Board's ruling in, *WKYC-TV*, 2012 NLRB LEXIS 851. The ALJ stated as follows:

> The General Counsel claims that pursuant to the Board's recent decision in *WKYC-TV*, 359 NLRB No. 30 (2012) the Respondent violated Section 8(a)(5) and (1) by failing to honor the dues checkoff provision of their agreement until either a new agreement was reached that eliminated dues checkoff or a valid impasse was reached.
>
> The Respondent contends that it gave notice to the Union on November 19, 2012, that it would cease deducting dues at the expiration of the contract and that the Union never requested bargaining over the cessation of dues deduction and has therefore waived its statutory bargaining rights on this issue. The Respondent also contends that pursuant to the court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which found invalid two of President. Obama's appointments to the Board, the Board did not have a proper quorum for it to issue its decision in *WKYC-TV, Inc*., supra. Therefore, according to the Respondent, the decision is invalid and should not be accorded precedential value.
>
> In *WKYC-TV*, supra, the Board held that "an employer, following contract expiration must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer." Id. slip op. at 8. In *WKYC-TV*, the Board overruled its decision in *Bethlehem Steel Co*., 136 NLRB 1500 (1962), affd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Since *Bethlehem Steel* had been the law for 50 years, the Board indicated it would apply its new rule prospectively. *WKYC-TV* makes it clear, however, that after December 12, 2012, the date the Board's decision issued, an employer's unilateral cessation of dues checkoff after the expiration of a contract containing such a clause would violate Section 8(a)(5) and (1).

(JA 125-126)

(6) The Board acknowledges in its Decision that it had to formulate a new theory of a violation of the Act because the Supreme Court rendered *WKYC, Inc*. invalid. (JA 198-199, FN 2) The Board also admits that contract modification theory was not alleged in the Complaint. (Ibid.)

Notwithstanding all of the above, the Board disingenuously maintains that contract modification theory was fully and fairly litigated. First, the Board maintains that contract medication was fully and fairly litigated because General Counsel stated during its opening statement that Midwest "ceased deducting dues at a time when it was legally and contractually bound to continue deducting members' dues." (JA 249) Nonetheless, the General Counsel did not offer a scintilla of evidence regarding a violation of the Act based upon a midterm modification theory. In its Decision, the Board goes so far as proclaiming that contract modification issue was "clearly presented" at the hearing, relying heavily upon the General Counsel's proclamation made during its opening statement. (JA 199, FN 2)

The General Counsel's proclamation in its Opening Statement is not evidence nor is it enough to overcome the totality of the record in this case which unequivocally establishes that the issue was not fully and fairly litigated. From the very beginning of its investigation, the Region maintained that Midwest's cessation of dues checkoff was unlawful pursuant to *WKYC-TV*. Neither, the allegations in

the Complaint nor the record evidence puts Midwest on notice of a potential midterm modification theory violation. Midwest based its defense(s) upon the record evidence introduced by the General Counsel in its effort to establish a violation of the Act on this particular issue. Contrary to the General Counsel's arguments otherwise, Midwest need not present defenses to potential legal theories if the General Counsel does not put forth any evidence establishing a cause of action under such a potential theory.

Next, General Counsel argues that no testimony was necessary with respect to Midwest's contractual obligation because the MOU "speaks for itself." Brief, p. 46. The MOU was offered into evidence in support of General Counsel's claim that Midwest violated §8(a)(5) and (1) of the Act by failing to implement or execute a successor contract, not the cessation of dues checkoff. Moreover, if the MOU "speaks for itself" and it was truly General Counsel's theory of the case, it would not have filed a motion to reopen the record to elicit further testimony regarding the cessation of dues checkoff. Again, the MOU was not mentioned a single time by the General Counsel or a witness during the General Counsel's case in chief regarding the cessation of dues checkoff. Any arguments otherwise are unfounded.

Third, the Board maintains that the contract modification argument was fully and fairly litigated because the ALJ "made several findings relevant to that

argument, *in the course of addressing Midwest's defense that the Union had waived bargaining over the cessation of dues checkoff*." (Brief, p. 46) (Emphasis added.) As noted in Midwest's principal brief, the ALJ did not address this argument relative to General Counsel's case in chief. Instead, the ALJ used the MOU to defeat Midwest's affirmative defense that the union waived its right to bargain over the cessation of dies checkoff. Specifically, the ALJ stated:

> Local 1982 did not waive its right to bargain over the cessation of the dues-checkoff provision. As discussed above, in May 2012, the parties affirmed their commitment to the continuation of a new dues-checkoff provision until a successor local agreement was reached. Thus, there is certainly no collective-bargaining provision that would establish that the Union has waived its right to bargain over a dues-checkoff provision.

(JA 221) Based upon the General Counsel's theory that Midwest violated the Board's ruling *WKYC-TV*, 2012 NLRB LEXIS 851 (2012), the ALJ concluded: "The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by unilaterally ceasing the deduction of dues pursuant to the checkoff provision of an expired collective-bargaining agreement." (JA 222) The fact that Midwest Excepted to the ALJ's ruling regarding its affirmative defense of waiver did not place the contract modification before the Board nor did it mean that the issue was fully and fairly litigated.

The midterm modification theory of a violation did not come to the forefront until well after the record was closed. More importantly, the only reason this

theory of liability was concocted is because the Board's ruling in *WKYC-TV* (the decision on which the General Counsel based its theory of the case and the decision the ALJ used to establish a violation of the Act) was subsequently ruled invalid by way of the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). This was a clear violation of Midwest's due process rights. See, *Amalgamated Meat Cutters and Butcher Workmen* at 229 (Cross-application for enforcement denied because lack of notice to employer prevented General Counsel's theory from being fully and fairly litigated.) See also, *Blake Constr. Co.*, at 279 (Application for enforcement denied in part because "Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing.) Further, Due process prohibits this Court from "granting the enforcement of remedies that go beyond the scope of the Complaint and directed towards violations of the Act not noticed or actually tried before the ALJ or the Board." See, *Blake Constr, Co.*, at 283.

Even if this Court were to determine that the midterm contract modification theory of a violation was fully and fairly litigated, the Board's decision is still irrational and arbitrary and not substantially supported by the record. The Board, either inadvertently or purposefully, disregarded Midwest's lawful Notice of Termination submitted to the union on October 3, 2012 (JA 479). Thus, any purported "midterm modification" was likewise terminated.

The General Counsel irrationally argues that § 8(d) of the Act prohibits one party to a collective bargaining agreement from altering the agreement absent the consent of the other party. (Brief, p. 44). Put another way, the General Counsel argues due to the MOU's "clear durational language," Midwest is precluded from ever terminating or modifying the MOU without first obtaining the union's consent. Under the General Counsel's theory, the MOU will continue in perpetuity until the parties reach a new agreement or the union consents to the termination of the MOU. Section 8(d) stands for nothing of the sort and General Counsel is fully aware (or no doubt should be).

Section 8(d) states as follows:

> **(d) OBLIGATION TO BARGAIN COLLECTIVELY** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> **(1)** serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, ***or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification***[.]

See, 29 U.S.C. § 158(d) (Emphasis added). Midwest's October 3, 2012 Notice of Termination (JA 479) clearly meets the parameters set forth in § 8(d). Accordingly, the Board's impromptu, post-hoc midterm modification theory of a violation fails.

C. Affirmative Defenses

1. Laches.

The Board maintains that Midwest waived its laches defense because it did not raise the issue in its positon statement. However, the Board's own correspondence expressly stated that Position Statements were not warranted. The Board's July 17, 2017 correspondence to the parties indicated that the Board had accepted the remand from this Court and that the "parties, *if they so desire*, *may* file statements of position with respect to the issues raised by the remand." (JA 225) (Emphasis added). Again, statements of positon were not mandatory and there was certainly no warning that a failure to file a statement of positon or failure to address a particular issue meant a party would be deemed to have waived or abandoned a prior argument. Pursuant to the Board's argument, Midwest would have waived all of its defenses had it not filed a Position Statement, even though it was not required to do so.

The ALJ determined that the General Counsel's substantial delay did cause Midwest prejudice and, further, it failed to explain the cause for the near 4 year delay. Specifically, the ALJ stated as follows:

> In the instant case, the action of the Acting General Counsel and his predecessors in not proceeding to trial in an expeditious manner regarding the complaint allegations arising from Cases 08-CA-038092, 08-CA-038581, and 08-CA-038627 has created a situation where two witnesses became unavailable to the Respondent and has therefore caused the Respondent some prejudice in presenting its defense to the complaint allegations arising from these charges. With respect to the allegations arising from Case 08-CA 083092, neither the record nor the General Counsel's brief explains why some of the allegations in a charge last amended on March 29, 2009, do not appear in a complaint until February 28, 2013.
>
> I am troubled by the fact that the long delay from the time the charges were filed in the three above noted cases until the trial was held has created a situation where witnesses have become unavailable to the Respondent in presenting its defense. However, the Board has generally not applied the doctrine of laches to itself or to the General Counsel. *F.M. Transport, Inc*., 302 NLRB 241 (1991).

(JA 91-92) As a result, the Board took it upon itself to try and explain away the General Counsel's abysmal failure to timely prosecute its case. This is ironic given both the Board's and General Counsel's multiple arguments that Midwest has waived various arguments by failing to properly address them before the Board or this Court. It is undisputed that General Counsel failed to justify why charges amended as far back as 2008 and 2009 do not appear in a Complaint until 2013.

Board rulings indicate that the doctrine of laches is generally inapplicable in Board proceedings. See, e.g. *St Anthony Hospital Systems*, 319 NLRB 46, 51

(1995) (Company asserting the defense must demonstrate a showing of delay entirely attributable to General Counsel and that the Company has been prejudiced by a lack of due process that veritably precludes it from effectively presenting its case) and *F.M. Transport Inc.*, 302 NLRB 241 (1991) (defense of laches not applicable where employer has made no showing of prejudice such that it would not possibly receive a fair trial on the unfair labor practice charges). However, these rulings do not completely bar its application and the ALJ already determined that Midwest was prejudiced in presenting its defense. Further, *Southwestern Merchandising Corp. v. NLRB*, 943 F.2d 1354, 1358(D.C. Cir. 1991) this Court entertained the doctrine of laches although it ultimately determined that it had "no warrant in distinguishing this case from *Rutter-Rex.*"

The Board relied in relevant part on *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) in determining not to dismiss the allegations based on the doctrine of laches. (JA 198, FN 1.) Unlike *Southwestern Merchandising Corp.*, the facts herein are distinguishable from those presented in *Rutter-Rex.* In *Rutter Rex*, the Board had *already* concluded that the Company violated the Act. Id. at 260. Nonetheless, the Region waited nearly 4 years before filing a backpay specification alleging the Company owed more than $342,000 in back pay. Id. 261. Here, Midwest has been prejudiced by a lack of due process that precluded it from effectively presenting a defense to determine whether the Act itself has been

violated, not the remedy sought by the Board for a violation of the Act. Put another way, this is not a situation where Midwest is seeking to benefit from General Counsel's extraordinary delay. Rather, this is a situation where ALJ deemed Midwest was prejudiced in its ability to present a viable defense to an alleged violation of the Act due solely to General Counsel's delay. Accordingly, Midwest maintains that the Board erred in not applying the doctrine of laches.

Alternatively, the Board should have at least adopted Member Hayes dissenting view that Midwest was in fact prejudiced by the General Counsel's over four year delay in prosecuting 8-CA-38581 without any explanation for the delay. Further, Member Johnson asserted that the Board should establish standards for the timely prosecution of ULP cases so as to avoid the kind of prejudice Midwest suffered in this case. (JA 198, FN 1.)

2. Ratification.

Nothing in the Board's brief rebuts Midwest's argument that then General Counsel Griffen's ratification was improper pursuant to this Court's ruling in *SW General v. NLRB*, 796 F.3d 67 (D.C. Cir. (2015), *affr'd, NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017). Procedurally, this case is indisputably no different.

In *SW General*, 796 F.3d 67, 80 (D.C. Cir. (2015), *affr'd, NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), this Court dismissed the complaint because it could not be certain that the complaint issued against SW General would have been

issued by any other Acting General Counsel other than Acting General Counsel Lafe Solomon. Further, this Court noted that the Board did not and could not rely on its decision issued in *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Circuit 1997) because no properly appointed General Counsel ratified the ULP complaint issued against SW General. Id. at 79. This case is no different. At the time this Court issued its decision, no properly appointed General Counsel had ever ratified the Complaints. However, unlike *SW General*, this Court permitted the new General Counsel to "ratify" the Complaints 4 ½ years after they issued and some 2 ½ years after the Board's initial March 2015 Order (JA 198) rather than dismissing the Complaint.

Remand was not proper as this case was never properly before the Board for a decision. In issuing its remand, this Court relied upon its decision in *Noel Canning v. NLRB*, 823 F.3d 76, 79 (D.C. Cir. 2016). But, *Noel Canning* relies exclusively on the premise that a question was "properly presented" to the Board, i.e., the complaint was authorized. Since the complaint was authorized, then so too was the subsequent administrative hearing, the ALJ's determination and the ensuing appeal to the Board. Thus, there was a question properly presented to the Board, but the Board could not issue a valid order until it regained a proper quorum. The facts herein are inapposite. Unlike a vacated decision under a

quorum analysis, there are no merits to reconsider because this case was never properly before the Board.

D. Midwest Did Not Waive Its Challenges to the Board's Findings that it violated Section 8(a)(1) of the Act by Threatening, Coercing and Grabbing Employees

The Board maintains that Midwest waived all arguments wherein it incorporated arguments from its Brief before the Board. Midwest had no other option at its disposal to reserve its right on appeal. Pursuant FRAP 32(a)(7) and D.C. Cir. R. 32(e) this Court's word is 13,000 words. Midwest's brief was over 12,800 words. Further, Midwest filed a Motion with this Court seeking to exceed the word limit noting that complying with FRAP 28(a)(6) alone would consume a significant portion of the allotted 13,000 words. Given the significant amount of issues for review, Midwest knew in advance and tried to alert the Court that it could not present its challenges within the word limits. The Board and the Court disagreed and Midwest was left with no other alternative. Dissimilar from the appellant in *Davis v. PBGC,* 734 F.3d 1161 (D.C. Cir. 2013) cited by the Board, Midwest did file a motion with this Court seeking to extend the word limit. Accordingly, Midwest seeks this court's permission to address the §8(a)(1) violations in a separate brief or, in the alternative, be allowed to address these claims on oral argument.

II. CONCLUSION

For all the reasons outlined above, Midwest respectfully requests that this Court grant its Petition for review and Deny the NLRB's cross-application for enforcement.

/s/ Ronald L. Mason
Ronald L. Mason (54642)
Aaron T. Tulencik (54649)
Mason Law Firm Co., L.P.A.
P.O. 398
Dublin, Ohio 43017
t: 614.734.9450
f: 614.734.9451
rmason@maslawfirm.com
atulencik@maslawfirm.com

Counsel for Petitioner/Cross-Respondent, Midwest Terminals of Toledo International, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief 6,379 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been was filed on this 15th day of August, 2018. Notice of this filing will be sent via the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Aaron T. Tulencik
Aaron T. Tulencik (54649)